

Amini (Migration) [2021] AATA 2881 (28 July 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Hassan Reza Amini
VISA APPLICANTS:	Ms Zarifa Mohammad Amin Ms Farzana Mohammad Amin
CASE NUMBER:	1925817
HOME AFFAIRS REFERENCES:	2012/002902 and OSF2012/002904
MEMBER:	Rosa Gagliardi
DATE:	28 July 2021
PLACE OF DECISION:	Australian Capital Territory
DECISION:	The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the applicants meet the following criteria for Subclass 117 (Orphan Relative) visas: • Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Statement made on 28 July 2021 at 2:57pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – false or misleading information given in application – national identity cards, obtained through agent in third country, found to be fraudulent – passports obtained on basis of these cards – compelling or compassionate reasons justifying grant of visa – information not purposely false or misleading – young females relying on assistance – prevalence of unauthorised agents – later travelled to home country at some risk to obtain genuine documents – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 117.223, Schedule 4, criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

Vyas v Minister for Immigration [2012] FMCA 92

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 16 July 2019 to refuse to grant the applicants Child (Migrant) (Class AH) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 6 December 2012. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 117.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because it was considered that false and misleading information was provided to the Department and the applicants did not meet Public Interest Criteria (PIC) 4020. There also did not appear to be any compelling or circumstances that justified the grant of the visa.
6. The review applicant/sponsor appeared before the Tribunal on 25 June 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicants in Afghanistan. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
7. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

11. Background

12. The first-named visa applicant, Ms Zarifa Mohammad Amin, applied for an Orphan Relative visa on 6 December 2012 on the basis of her claimed sibling relationship with the sponsor, Mr Hassan Reza Amini. At the time of the application Ms Zarifa Mohammad Amin claimed to be 16 years of age and unmarried.
13. The second-named visa applicant, Ms Farzana Mohammad Amin similarly applied for an Orphan Relative visa on 6 December 2012, also on the basis of her claimed sibling relationship with Mr Hassan Reza Amini. At the time of application Ms Farzana Mohammad Amin claimed to be 13 and unmarried.
14. It is claimed that Ms Farzana Mohammad Amin and Ms Zarifa Mohammad Amin are biological siblings and are Afghani nationals.
15. The sponsor came to Australia on 22 April 2011 as an illegal maritime arrival but has now regularised his status in Australia.
16. At the time of application, the siblings provided their Tazkiras to support their claims regarding their identities.
 - Zarifa's tazkira reflected a serial number of 811431. Her Afghan passport OA1726177 purportedly issued by the Kabul Police Department on 2 October 2012.
 - Farzana's tazkira had a serial number of 814330. She also presented an Afghan passport OA1728179 purportedly issued by the Kabul Police Department on 2 October 2012.
17. The Department received written advice from NSIA, however, that the serial numbers provided did not correspond to their records and "*had not been issued by the relevant authority*" and therefore it was concluded that the tazkiras were fraudulent.
18. The sponsor and applicants were provided with an opportunity to comment on the adverse information that pointed to their tazkiras being non-genuine. On 15 July 2019 the sponsor submitted a statutory declaration advising that his siblings moved to Pakistan in January 2012 following the death of their father and remarriage of his mother to another Afghan male, who is not obliged by custom to care for his spouse's children.
19. The sponsor also advised that as his siblings were resident in Quetta, Pakistan, and in the absence of a male guardian, they requested a local agent to obtain their identity documents. As is common in many applications from a similar cohort that have been assessed by the Department the applicants claimed to have obtained the tazkiras without knowing they were fraudulent through the agent. It is claimed that the tazkiras were thought to be genuine.
20. It is also claimed that the biological mother remained living with her husband in Afghanistan. The biological mother is claimed to have been killed in a traffic accident in April 2012. It is claimed that neither the applicants nor their siblings were able to attend her funeral.
21. The Department noted that in addition to the "fraudulent" tazkiras, the applicants had provided manually issued Afghan passports purportedly by the Kabul police department.

The Department did not, however, undertake independent verification checks for the passports, however the passports were also considered to be “fraudulent” if they were issued on the basis of the fraudulent tazkiras.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

22. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
23. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
24. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
25. Tazkiras are official identity certificates issued by Afghanistan’s Population Registration (PRD) to Afghan nationals. The PRD has been responsible for registering details relating to births and deaths and is the only authority that issued documents such as birth certificates and other security release forms for Afghan citizens. A tazkira serves as an Afghan citizen’s primary form of identification and means of accessing legal entitlements. Every Afghan is required to have this identity document (tazkira) and it is necessary to have one to apply for jobs, be admitted into a school or university, obtain a passport, register marriages with the Supreme Court of Afghanistan, permission to run a business or to rent, and to buy or sell a property.
26. As the Department has written in its decision, “*Tazkiras are issued by the Afghan PD in Kabul or by PRD offices at provinces in Afghanistan. Adults must apply for Tazkiras in person. Tazkiras are not issued, and have not been issued, by the Afghan diplomatic missions in Pakistan (Tribunal emphasis). The PRD is required to check family records (family tree) from previous registrations either in Kabul or at the home province prior to the issue of a tazkira to a new family member. A tazkira is issued based on the closest male relative’s tazkira such as father, brother and uncle. Recently, (circa 2017), tazkira issuance may be facilitated by consulates outside of Afghanistan. However, it must be noted that the tazkira will be issued by the PRD in Kabul (Tribunal emphasis), who will verify the registration details of other family members prior to issuance and ensure details of the registration are recorded in the registry*”.
27. The Department also noted that in its experience official Afghan documents provided to Afghan nationals are issued based on information provided by the requestor rather than being based on official records, and that they can easily be obtained through the payment of bribes – hence, indicating that the system in Afghanistan/Pakistan has not been reliable as a premise and reflects more on the system rather than an applicant who simply attempts to obtain the necessary paperwork to lodge an application.

28. In a statutory declaration dated 15 July 2019 the sponsor explained that he asked his sisters to move to Pakistan in around 2012 to be close to their brother, Jawad, who was living there. The sponsor declared that he had told his sisters to obtain their tazkiras. At that time they engaged an agent to assist them.
29. In a statutory declaration dated 19 June 2021, the sponsor stated that the applicants were younger and living in Pakistan and it was unsafe and not possible for them to travel to Afghanistan in person to comply with the requirements of the PRD.
30. It would appear, therefore, that the tazkiras were issued by an unauthorised party but based on later information, it would appear that the information contained therein was not *purposely* false or misleading. The Tribunal has had regard to the decision in *Vyas & Anor v Minister for Immigration & Anor* [2012] FMCA 92, which held that it was not necessary for an applicant to know that the document they gave, or caused to be given, to an officer was a bogus document in order for PIC 4020(1) to be engaged. Nonetheless, as per *Trivedi* an element of fraud or deception by some person is necessary to attract the operation of the provision.
31. The Tribunal is satisfied that there was no intention on the part of the applicants to provide false or misleading information to the Department. The context in which the tazkiras which were not obtained appropriately in Afghanistan and were given to the applicants, must be seen in context. The applicants were young teenagers who would have relied on the direction of others to try and meet the requirements of the visa applications. The Tribunal also accepts that they would have run significant risks returning to Afghanistan, even though they later did (in 2016 to remedy the documentation) and it is claimed that they have been assaulted due to living as single females on their own there.
32. In terms of whether it can be said that the authorities in Pakistan have attempted to deliberately defraud immigration or perpetrate a deception on the Department, the Tribunal considers that such a view would overlook the reality that the system in Pakistan to issue documentation exists, because there is a demand. In all likelihood, the applicants told the agent the information they knew about their identities and the agent for a fee provided documents the applicants thought they could use, even though they were not issued correctly.
33. The Tribunal considers it is unreasonable to visit the fact that it was not possible for the applicants to get authorised documentation in Pakistan as Afghani nationals, on the applicants.
34. The Tribunal's view is reinforced because the applicants ultimately travelled to Afghanistan and have now been granted Smart Identity Cards from the Kabul Office of the Ministry of Interior Affairs in person based on biometrics and other identity factors. Smart Identity Cards have replaced the older system and is the highest level of identity verification in Afghanistan. They have also provided corresponding passports. The Tribunal is minded to place significant weight on the new documentation which does not significantly depart from the in the old tazkiras, even though those tazkiras were wrongly obtained and not according to the requirements of the PRD.
35. Therefore, the applicants meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

36. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is

granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

37. The Tribunal does not have any evidence before it that a visa has previously been refused on the basis of a failure to satisfy PIC 4020(10) and therefore, PIC 4020(2) does not apply.

Has the applicant satisfied the identity requirements?

38. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. On the basis of the new documentation provided by the applicants, the Tribunal is satisfied that the applicants meet PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

39. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
40. No such information is before the Tribunal, therefore PIC 4020(2B) does not apply.

41. Conclusion

42. On the basis of the above, the applicants satisfy PIC 4020 for the purposes of cl. 117.223.

DECISION

43. The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the applicants meet the following criteria for Subclass 117 (Orphan Relative) visas:
- Public Interest Criterion 4020 for the purposes of cl 117.223 of Schedule 2 to the Regulations.

Rosa Gagliardi
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...